

[Not Always] Keeping the [Good] Faith



“

If it seems like I've been lost... if you think I'm feeling older and missing my younger days... you should have known me much better cause my past is something that never [seems to have] got in my way¹...

Extracted from Keeping the Faith, Billy Joel

”



If it seems like I've been lost

1 *'Keeping the Faith'* by Billy Joel, from *An Innocent Man*, 1983

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Introduction

With an increasing number of standard form construction contracts adopting the language of 'good faith' whilst seeking to promote 'collaborative working'³ against a backdrop of increasingly complex projects and party interfaces that are, generally, still being procured through a traditional risk transfer matrix, what is the meaning of those terms in an English law context where the courts have been sceptical or scathing of the concept of Good Faith?

Does a good faith obligation facilitate collaborative working?

In an international context, whilst there is no obligation of good faith in the FIDIC forms,⁴ such an obligation is implied by most civil codes. NEC3 clause 10.1 includes an obligation to act in a spirit of mutual trust and cooperation, is that akin to good faith?

With increasing express reference to good faith, implied obligations arising from EU regulation⁵ and civil law application, this note looks at the implications of those requirements and whether they assist in facilitating collaborative contracting.

3 See e.g. JCT SBC/Q 2016, JCT CE 2016, JCT DB 2016, NEC4, ICC 2014, PPC2000.

4 Other than in the 2017 FIDIC White Book for the appointment of consultants which includes an obligation that 'In all dealings under the Agreement the Client and the Consultant shall act in good faith and in a spirit of mutual trust', at clause 1.16.1.

5 Particularly in consumer contracts.

What is the impact of good faith obligations and other means by which contractual rights and obligations can help project participants to work together collaboratively?

Recognised Good Faith Obligations under English Law

English law has a fractious relationship with the concept and application of good faith in contracts, notwithstanding, certain classifications of contract bring with them a good faith obligation, including:

- i. **Contracts of Insurance.** In 1766, Lord Mansfield C.J. stated: “*The governing principle [of Good Faith] is applicable to all contracts and dealings.*”⁶

Insurance contracts encompass the doctrine of utmost good faith. The duty to avoid misrepresentation is coupled with an obligation to disclose all material facts.⁷ Non-disclosure entitled insurers to avoid the contract; now restricted whilst stressing the mutuality of good faith.⁸

Lord Mansfield’s, largely unsuccessful, attempt to introduce the civil law notion

of good faith into English common law continues to apply to a limited class of transactions, including insurance.⁹

English law recognises good faith in contracts arising from fiduciary relations,¹⁰ such as:

- ii. **Agency.** An agent must act honestly and not allow his own interests to conflict with those of his principal. The Commercial Agents (Council Directive) Regulations,¹¹ imposes a duty of good faith.¹²
- iii. **Partnership.** Is a “*contract of good faith*”.¹³
- iv. **Company directors.** Overriding duty of directors to act, in good faith, to promote the interests of the company. Under s 172.1 Companies Act 2006.
- v. **Mortgages.** A property mortgagee must exercise powers in good faith.¹⁴

6 *Carter v Boehm* (1766) 97 Eng. Rep. 1162, 1165.

7 Now partially codified in the Marine Insurance Act, 1906, 6 Edw. 7, c. 41, §§ 17-20 (Eng.).

8 See, e.g., the judgments in *Lambert v Co-operative Ins. Society*, [1975] 2 Lloyd’s Rep. 485. See also Consumer Insurance (Disclosure and Representations) Act 2012; Insurance Act 2015.

9 See Lord Mustill in *Pan Atl. Ins. Co. Ltd. v Pine Top Ins. Co.*, [1994] 1 AC 501 (HL), and Lord Hobhouse in *Manifest Shipping Co. Ltd. v Uni-Polaris Shipping Co. Ltd.*, [2003] 1 AC 469. See also Potter L.J.’s observations in *James Spencer & Co. Ltd. v Tame Valey Padding Co. Ltd.*, QBENI 97/1118 CMS1 (AC April 8, 1998).

10 Fiduciary relationship: a relationship in which one party places special trust, confidence, and reliance in and influenced by another who has a fiduciary duty to act for the benefit of the party. Merriam Webster Dictionary of Law, ISBN: 978-0-87779-735-7.

11 1993, implementing EU Directive 86/653.

12 SI 1993/3053 reg.3(1), implementing Directive 86/653 art.3(1).

13 *O’Neil v Phillips* [1999] 1 WLR 1092, 1098, per Lord Hoffmann; see *Blisset v Daniel* (1853) 10 Hare 493; *Floydd v Cheney, Cheney & Floydd* [1970] Ch. 602, 608; *Conlon v Simms* [2006] EWCA Civ 1749, [2007] 3 All ER 802 at [127]. See also Partnership Act 1890 which provides that partners have an implied duty of good faith that requires them to act honestly in the best interests of the partnership.

14 *Downsview Ltd v First City Corp Ltd* [1993] AC 295, 312 and *Albany Home Loans Ltd v Massey* [1997] 2 All ER 609, 612-613.

vi. **Joint Venture.** Implied duty of ‘honesty and good faith’ in contracts for JV’s and similar arrangements.¹⁵

vii. **Employment.** Implied term requiring good faith and loyalty by employer and employee.¹⁶

While a fiduciary must act in good faith, an express contract term requiring good faith does not mean a fiduciary relationship exists.¹⁷ Any fiduciary duties that do exist must “be moulded to fit the contractual framework”.¹⁸



15 *Nathan v Smilovitch (No.2)* [2002] EWHC 1629 (Ch) at [9]; *Training in Compliance Ltd v Dewse* [2004] EWHC 3094 (QB), [2004] All ER (D) 377 (Dec); *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All ER (Comm) 849 at [57]; but cf. *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All ER (Comm) 451 at [51], relying on *Bedfordshire CC v Fitzpatrick Contractors Ltd* [1998] 62 ConLR 64 (Dyson J.); *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch) at [106]-[112]. But cf. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).

16 *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518 at [24], *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 AC 503 at [4]-[6], [51]; cf. *Prudential Staff Pensions Ltd v Prudential Assurance Co Ltd* [2011] EWHC 960 (Ch), [2011] PensLR 239 at [140]-[153]; *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 (QB), [2011] IRLR 138 at [148]-[159]; *Threlfall v ECD Insight Ltd* [2012] EWHC 3543 (QB) at [112]- [115]. See also *Malik v Bank of Credit and Commerce International SA (In Liquidation)* [1998] AC 20 but see *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192.

17 *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) at [133].

18 *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) at [123], referring to *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at [70] (HC Aus, Mason J.); *Henderson v Merrell Syndicates Ltd* [1995] 2 AC 145 at 206.

No General Application of Good Faith in English Law

The recognised view is that there is no general legal principle of good faith in English contract law.

Bingham L.J. observed in *Interfoto*:¹⁹ “In many civil law systems... the law of obligations recognises and enforces an overriding principle that... parties should act in good faith... its effect is... conveyed... as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table.’ It is in essence a principle of fair open dealing... English law has... committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.”²⁰

Time and again over recent decades, English judges have resisted a general ground for relief for unfairness,²¹ noting:

i. **Walford.** “... the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations²² ... [and]... unworkable in practice.”²³

ii. **James Spencer.** “There is no general doctrine of good faith in the English law of contract. The [injured parties] are free to act as they wish, provided that they do not act in breach of a term of the contract.”²⁴

iii. **ING.** “Outside the insurance context, there is no obligation... to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law... Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs... individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion...”²⁵

19 *Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd* [1989] 1 QB 433.

20 *Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd* [1989] 1 QB 433, 439. Bingham L.J. gave as illustrations of these solutions: equity’s striking down of unconscionable bargains, statutory control of exemption clauses and hire-purchase and the ineffectiveness of penalty clauses. See similarly, *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 AC 507 at [17], Lord Bingham of Cornhill.

21 As illustrated in the response to the attempt of Lord Denning M.R. to construct a general principle of ‘inequality of bargaining power’ in *Lloyds Bank Ltd v Bundy* [1975] QB 326, 339 and the House of Lords’ refusal in *Walford v Miles* [1992] 2 AC 128, 138 to imply a term in a ‘lock-out’ agreement to negotiate in good faith.

22 *Walford v Miles* [1992] 2 AC 128, Lord Ackner. The agreement was held unenforceable on the grounds of uncertainty.

23 *Walford v Miles* [1992] 2 AC 128, 138. In *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, 772.

24 *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* Unreported April 8, 1998 CA (Civ Div), Potter L.J. Similarly *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977, [2004] 2 Lloyd’s Rep. 352 at [113]; *Horkulak v Camor Fitzgerald International* [2004] EWCA Civ 1287, [2005] ICR 402 at [30]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] BLR 265 at [105], cf. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] Lloyd’s Rep. 526 at [121]-[154].

25 *NG Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2011] All ER (D) 39 (Apr) at [92], Rix L.J.

iv. **Union Eagle.**“... the reasons why the courts have rejected such generalisations are founded not merely upon authority ... but also upon considerations of business... if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be ‘unconscionable’ is sufficient to create uncertainty.”²⁶

Opponents believe that a general doctrine of good faith would create too much uncertainty by establishing vague and subjective obligations undermining contractual certainty: “as long as our courts always respect the reasonable expectations of the parties, our contract law can satisfactorily be left to develop in accordance with its own pragmatic traditions”.²⁷



26 *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at 518, Lord Hoffmann.

27 *Francois Abballe (t/a GFA) v Alslom UK Ltd* LTL 7.8.00 [TCC], HHJ Humphrey LLoyd QC.

Implied Terms Analogous to ‘Good Faith’

Implied terms. Broad concepts of fair dealing are reflected in the court’s construction and implication of terms: “A thread runs through our contract law that effect must be given to the reasonable expectations of honest men”.²⁸

Where a comprehensive written contract exists there will be little room to imply terms. Where a matter is expressly addressed in the contract no term addressing the same matter will be implied.²⁹ Good faith may be a consideration for implying context-specific terms into a contract.³⁰

Honesty. Contracts assume honest performance.³¹ The courts may find breach of an implied duty to act in good faith, including a duty to act honestly³² and with integrity.³³

Contract interpretation adopts an objective standard of the reasonable person, who may wish to pursue their own self-interest but who is not dishonest: “no person may benefit from [their] own wrongdoing”.³⁴

Co-operation. Employers impliedly agree to do all that is necessary on their part to bring about completion of the contract;³⁵ parties will not hinder or prevent each other from carrying out their obligations in accordance

with the contract.³⁶ Vinelott J reached those conclusions applying general principles whilst holding that there was no implied duty of good faith. It is difficult to see what an implied duty of good faith adds beyond that.

Holding the balance fairly between opposing interests. Where the quantity surveyor assesses interim payments, the engineer issues certificates etc., there is an implied term that they will do so fairly.³⁷ That is different from an implied obligation to act in good faith.

Restriction on contractual discretion.

English common law recognises restrictions on the exercise of contractual discretion. A party must not exercise such discretion in an arbitrary, capricious or irrational manner.³⁸

It is argued that the above rules usually lead to the same outcome as the ‘good faith’ provision in a civil law jurisdiction.³⁹



Whilst English law may be wired differently, implied terms are analogous to ‘Good Faith’

28 Steyn LJ in *First Energy (UK Ltd) v Hungarian Investment Bank Ltd* [1993] 2 Lloyd’s Rep 194. See also Contract Law: Fulfilling the reasonable expectations of honest men, Lord Steyn, 113 The LQRev 1997.

29 See, e.g. *Lynch v Thorne* [1956] 1 WLR 303, CA; *Jones v St John’s College, Oxford* (1870) LR 6 QB 115 at 126; cf. *Euro-Diam Ltd v Bathurst* [1990] QB 1 at [40], CA.

30 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

31 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6.

32 *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch); *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977 (Comm), [2004] 2 Lloyd’s Rep. 352 at [113]-[114].

33 *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226.

34 See *Beresford v Royal Insurance Co Ltd* [1938] AC 586.

35 *Mackay v Dick* (1881) 6 AC 251 at 263, HL; Cf. *Hamlyn v Wood* [1891] 2 QB 488, CA; *Holland Hannen & Cubitts v WHTSO* (1982) 18 BLR 80 at 117; *Lorne-Stewart v William Sindall* (1986) 35 BLR 109 from 127.

36 *London Borough of Merton v Leach* (1985) 32 BLR 51 at 81, Vinelott J.

37 *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 at [77]-[83].

38 See e.g. *Socimer International Bank v Standard Bank* [2008] 1 Lloyd’s Rep 528.

39 In *Societe Les Marechaux Cass. Comm.*, 10-07-2007, the Cour de Cassation observed: “The courts’ control of bad faith is limited to the contractual prerogatives and cannot affect the substance of the contract”.

Good Faith in English Law – 'Swimming Against the Tide'

Regulations implementing European Union ('EU') directives import a requirement of good faith; US courts accept that all contracts have an implied good faith obligation;⁴⁰ other common law jurisdictions are developing in the same manner. *Yam Seng*⁴¹ argued that England was swimming against the tide of EU legislation, concluding "*there seems... to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying [a duty of good faith] in any ordinary commercial contract based on the presumed intentions of the parties.*"

Some welcomed Leggatt J's decision,⁴² others argued that the obligations breached are, or are not, implied-in-fact; it is redundant to imply an obligation to act in good faith and then, derive specific obligations from that general obligation.⁴³

Some judges were critical of *Yam Seng*.⁴⁴ *MSC*⁴⁵ rejected the principle: "*There is... a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.*"⁴⁶

Where English law has accepted good faith into consumer contracts, insurance, employment, agency etc., is resistance in connection with commercial contracts a twisted case of the Billy Joel's?

"If it seems like I've been lost... if you think I'm feeling older and missing my younger days... you should have known me much better cause my past is something that never [seems to have] got in my way..."⁴⁷



Swimming against the tide

40 Uniform Commercial Code §1-203.

41 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

42 See e.g. Jan van Dunné, 'On a clear day you can see the Continent – the shrouded acceptance of good faith as a general rule of contract law on the British Isles', 31 CLJ (2015) 3-25; Trakman & Sharma, 'The binding force of agreements to negotiate in good faith', 73 Cambridge Law Journal (2014) 598-628.

43 Carter & Courtney, 'Good faith in contracts: is there an implied promise to act honestly?', 75 Cambridge Law Journal (2016) 608-619.

44 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

45 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789.

46 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [45], Moore-Bick LJ.

47 Extracted from 'Keeping the Faith', Billy Joel.

Yam Seng, a Reprise! – Implied Obligation of Good Faith in ‘Relational Contracts’

In Tahnoon⁴⁸ Leggatt J said: “... in Yam Seng... I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long term basis... Such ‘relational’ contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships... It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith.

Although the observations that I made in the Yam Seng case about the scope for implying duties of good faith in English contract law have provoked divergent reactions, there appears to be growing recognition that such a duty may readily be implied in a relational contract.”

Leggatt J held that Tahnoon⁴⁹ involved a relational contract and business necessity required implying a duty of good faith, stating: “It is unnecessary and perhaps impossible to attempt to spell out an exhaustive description of what this obligation involved”, referring to a number of Australian cases which he states have informed the English interpretation of express contractual duties of good faith.⁵⁰

Leggatt J refers to Paciocco,⁵¹ stating “the usual content of the obligation of good faith was an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties... and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people.”⁵²

Where Leggatt J’s summary of Paciocco⁵³ is consistent with implied terms of honesty,⁵⁴ co-operation and holding the balance fairly between opposing interests,⁵⁵ under English case law, which Leggatt J seems to recognise himself in Paciocco, where is the requirement to imply a duty of good faith?

48 *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] EWHC 333 (Comm).

49 *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] EWHC 333 (Comm).

50 See *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), paras 91-97; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch), paras 240-246; *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC), paras 89-91.

51 *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, para 288.

52 Leggatt J further refers to *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), para 295, again; and *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), para 98.

53 *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, para 288.

54 Paciocco “to act honestly and with fidelity to the bargain... not to act dishonestly and not to act to undermine the bargain”.

55 Paciocco “to act reasonably and with fair dealing having regard to the interests of the parties”.

What are ‘Relational Contracts’?

Tahnoon⁵⁶ cites ‘relational contract’ decisions where a good faith obligation is implied-in-fact, including:

- i. **Portsmouth City Council**, a good faith obligation was implied into a 25-year PFI contract referring to the statutory ‘best value’ duty recognition in the contract; the judge accepted “a duty of good faith is not usually implied into commercial contracts under English law”.⁵⁷
- ii. **Amey Birmingham**, a 25 year PFI contract could be classified as a ‘relational contract’, given the “massive length” of the contract.⁵⁸
- iii. **National Air Services**, endorsed Yam Seng,⁵⁹ but decided this contract was not appropriate for the implication of a duty of good faith.⁶⁰
- iv. **Property Alliance Group Ltd**, accepted ‘recognised categories’ of contracts in which good faith may be implied, but this case did not fall within any such category.⁶¹

- v. **Al Nehayan**, a long term JV was a ‘relational contract’ subject to an implied duty of good faith.⁶²

Professor Collins,⁶³ after discussing Yam Seng⁶⁴ and subsequent cases,⁶⁵ concludes: “the building blocks of a legal concept of a relational contract seem to be in place”, identifying features as:

- i. A long-term business relationship.
- ii. Investment, or anticipated investment, of substantial resources by both parties.
- iii. Implicit expectations of co-operation and loyalty that shape performance obligations in order to give business efficacy to the project.
- iv. Implicit expectations of mutual trust and confidence going beyond the avoidance of dishonesty.

Akenhead J, in TSG,⁶⁶ did not accept that there was an implied overriding duty, created by the good faith wording in the TPC2005 contract,⁶⁷ to preserve a long-term relationship where there was an express right to terminate. Dyson J, in Bedfordshire⁶⁸ confirmed that there is no special obligation of ‘trust and confidence’ arising only due to a long-term relationship.

56 *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] EWHC 333 (Comm).

57 *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC) [81], Edwards-Stuart J.

58 *Amey Birmingham v Birmingham City Council* [2018] EWCA Civ 264, Jackson LJ, obiter.

59 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

60 *National Private Air Transport Services Company (National Air Services) Ltd v Creditrade LLP and anor* [2016] EWHC 2144 (Comm), [132]-[136], Blair J.

61 *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2016] EWHC 3342 (Ch), [275]-[276], Asplin J.

62 *Al Nehayan v Kent* [2018] EWHC 333, Leggatt LJ.

63 ‘Is a Relational Contract a Legal Concept?’ Professor Hugh Collins in Degeling, Edelman and Goudkamp (eds), *Contracts in Commercial Law* (Sydney, Thompson Reuters, 2016).

64 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

65 *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) and *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB).

66 *TSG Building Services v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC).

67 *ACA Standard Form of Contract for Term Partnering (TPC 2005 amended 2008)*.

68 *Bedfordshire CC v Fitzpatrick Contractors Ltd* [1998] 62 ConLR 64.

‘Relational’ contracts may contain express or implied obligations to co-operate.⁶⁹ Notwithstanding, the law implies a duty to co-operate. What does a general obligation of good faith add beyond obligations inherent in the express or implied terms?

Professor Collins⁷⁰ features for ‘relational contracts’ are found on a multitude of large, complex one-off projects. Those do not themselves create a special class of contract.

Globe Motors⁷¹ centred on a long-term contract but the court stated the *“implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract”*. That provides a cogent statement of English law in respect of good faith and ‘relational contracts’. Leggatt J’s reformulation of a Yam Seng⁷² good faith obligation under a new contract classification may face similar difficulty.

Recent Clarification on Relational Contracts and the Duty of Good Faith

Despite the apparent lack of support for the concept of relational contracts, with the consequent implication of a good faith obligation, in recent case law, Fraser J held, in the recent High Court decision in *Alan Bates and Others v Post Office Limited* [2019] EWHC 606 (QB), that relational contracts were a specific classification of contract⁷³ stating:

“I therefore consider that in this respect, the learned editors of Chitty do not correctly summarise the jurisprudence in this area of the law. I consider that there is a specie of

contracts, which are most usefully termed “relational contracts”, in which there is implied an obligation of good faith (which is also termed “fair dealing” in some of the cases). This means that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. An implied duty of good faith does not mean solely that the parties must be honest.”

Fraser J, whilst noting that classification of a contract as ‘relational’ was inherently fact specific, went on to outline nine characteristics relevant when reaching that determination. Those, non-exhaustive, characteristics relevant as to whether a contract is a relational one or not were stated as:

- “1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
4. The parties will be committed to collaborating with one another in the performance of the contract.
5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

69 *Mackay v Dick* (1881) 6 AC 251 at 263, HL; *London Borough of Merton v Leach* (1985) 32 BLR 51 at 81. *Hamlyn v Wood* (1891) 2 QB 488, CA; *Holland Hannen & Cubitts v WHTSO* (1982) 18 BLR 80 at 117; *Lorne-Stewart v William Sindall* (1986) 35 BLR 109 at 127.

70 *‘Is a Relational Contract a Legal Concept?’* in Degeling, Edelman and Goudkamp (eds), *Contracts in Commercial Law* (Sydney, Thompson Reuters, 2016), Hugh Collins.

71 *Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd* [2016] EWCA Civ 396.

72 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

73 *Alan Bates and Others v Post Office Limited* [2019] EWHC 606 (QB) at 711.

7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.

8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.

9. Exclusivity of the relationship may also be present.”

Having determined that the Contracts were relational, and that a duty of good faith ought to be implied, what was the scope of that duty?

Other than the quotation set out above,⁷⁴ Fraser J concluded that several specific terms were to be implied into the contracts in question:

*“Of the 21 different implied terms identified in Common Issue 2... a number [17 number] are, in my judgment, consequential upon these contracts being found to be relational, namely to include an implied obligation of good faith.”*⁷⁵

The 17 ‘consequential’ terms were implied as a result of Fraser J’s finding that these were relational contracts. Whilst those were fact specific to the contracts under question that does appear to open the possibility of judges implying terms beyond a simple obligation to act in good faith should they determine a contract is relational; a classification that, looking at the list of characteristics given above, I suggest, remains uncertain.

Partnering Charters

Non-binding partnering charters describing shared objectives, values and expectations have been a feature of collaborative working approaches.⁷⁶

In Birse⁷⁷ a ‘non-binding’ charter stated that the parties would *“produce an exceptional quality development within the agreed time frame, at least cost, enhancing our reputations through mutual trust and cooperation”*. A contract was never signed. The judge⁷⁸ did not regard ‘mutual trust and cooperation’ to be an express term nor did they modify terms or infer conduct. The judgment is consistent with the position at English law that there is no general duty of good faith. The charter was held to influence the approach to interpreting the subsequent contract, notwithstanding the good faith provisions were something less than contractually binding. It is not clear how an arbitrator would/could account for the charter!

It has been held that a charter will not be enforced if its wording is too vague.⁷⁹

74 Ibid.

75 Ibid at 746.

76 Originating from *“Rethinking Construction”* 1998, Sir John Egan.

77 *Birse Construction Ltd v St David Ltd* [1999] BLR 194 (TCC).

78 HHJ Humphrey LLoyd QC.

79 *Fujitsu Services Ltd v IBM UK Ltd* [2014] EWHC 752 (TCC); 153 ConLR 203.

Adoption of Good Faith Requirements in English Law through EU Instruments

Under most European civil codes, contracts are construed according to a general obligation of good faith.⁸⁰

Whilst English law has not recognised an obligation of good faith as inherent in all commercial contracts, good faith obligations have been incorporated into English contract legislation through EU legislation.⁸¹ Such references include:

- i. *“requirement of good faith”*.⁸² Defined by Bingham LJ as *“...one of fair and open dealing ... which looks to good standards of commercial morality and practice”*.⁸³
- ii. *“Good faith and fair dealing”*.⁸⁴
- iii. *“good faith”*.⁸⁵
- iv. *“principles of good faith in commercial transactions”*.⁸⁶
- v. *“... honest market practice and/or the general principle of good faith in the trader’s field of activity.”*⁸⁷

That inclusion has intensified examination of good faith in an English law context.

80 See e.g. French Civil Code article 1134, s.3; German Civil Code [German Bürgerliches Gesetzbuch] § 242; Swiss Civil Code Article 2; Italian Civil Code Article’s 1175 and 1375; Greek Civil Code Article 288; Portuguese Civil Code Article 762, s.2; Dutch Civil Code Article’s 6:2 and 6:248. See also Article 1.7 UNIDROIT Principles of International Commercial Contracts and Article 1.201 The Principles of European Contract Law.

81 See Chitty on Contract, 32nd edn, chapter 1, para 1-043 for a comprehensive list.

82 Art.3(1), implemented by the Unfair Terms in Consumer Contracts Regulations (SI 1999/2083) reg.5(1) and the Consumer Rights Act 2015 s.62(4).

83 Director General of Fair Trading v First National Bank (HL) [2001] UKHL 52; [2002] 1 Lloyd’s Rep 489; [2002] AC 481; [2001] 3 WLR 1297; [2002] 1 All ER 97.

84 Directive 2011/7/EU on combating late payment in commercial transactions [2011] OJ 48/1 art.7(11)(a). Directive 2011/7/EU is implemented in UK law by the Late Payment of Commercial Debts Regulations 2013 (SI 2013/395) amending the Late Payment of Commercial Debts (Interest) Act 1998.

85 Directive 86/653 on the co-ordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17: art.3(1), implemented in UK law by the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053) reg.3(1) and see Rosetti Marketing Ltd v Diamond Sofa Co Ltd [2011] EWHC 2482 (QB), [2012] 1 All ER (Comm) 18 at [41]-[42].

86 Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] OJ L271/16, art.3(2) implemented by the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.7(2).

87 Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/16 art.5(2) and art.2(h) implemented by the Consumer Protection from Unfair Trading.

Express Obligations to Act in Good Faith

Parties can agree an express obligation to act in good faith. Such term(s) are construed by the courts as to duty, if any, and the factual application of the same. Such term(s) are construed by the courts as to the nature of the duty, if any exists, and the factual application of any obligations.

Have parties agreed to act in good faith?

Terms creating a duty of good faith are not prescriptive. Obligations have arisen from statements to, e.g.:

- i. Act with the utmost good faith.⁸⁸
- ii. Resolve disputes by friendly discussion.⁸⁹
- iii. Act in absolute faith.⁹⁰

Adding 'utmost' or 'absolute' appears superfluous and does not influence the extent of the obligation.

The terms used must be clear. An obligation on parties to “have regard” to “partnering principles”, to “champion the partnering relationship”, be “open, honest, clear and reliable” was insufficient to impose a duty of good faith or create contractual certainty. To “have regard” meant parties had chosen not to recognise any express agreement for good faith.⁹¹ An express duty of good faith may apply to some, but not all, obligations in a contract.

Where the clause is as a jumble of different statements in an incoherent order, the express duty of good faith does not apply to the contract as a whole but only to the specific objectives to which it attaches.⁹² Whilst English law will respect and enforce an express obligation to act in good faith, it will do so restrictively, looking to the context of the particular contract as a whole.

What then does a duty of good faith mean?

Vos J summarised an express duty of good faith: “[to] adhere to the spirit of the contract, to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose, and to act consistently with the justified expectations of [the other party]”.⁹³ The meaning will depend on the circumstances of the case and the commercial context.



Hang on, you want to add express obligations to act in good faith to my English law implied terms! What does that mean?

88 *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535.

89 *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104.

90 *Horn v Commercial Acceptances* [2011] EWHC 1757.

91 *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752.

92 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Trading Ltd* [2013] EWCA Civ 200.

93 *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535.

Express duties of good faith may support the following (in the context in which those duties were considered):

- i. **Prevent action that frustrates the purpose of the agreement.** Under a contractual undertaking to act in *‘utmost good faith’*.⁹⁴
- ii. **Require the disclosure of material facts to the other party.** Where *“each party shall act in absolute faith towards the other”*.⁹⁵
- iii. **Prohibit knowingly lulling the other party into a false belief.** An express duty to act *“in the spirit of mutual trust and co-operation”* in an NEC building contract might *“at its highest”* prevent a party lulling the other into thinking contractual rights did not exist or would not be relied upon.⁹⁶
- iv. **Prohibit asking for information under a pretence.** Express obligation to *‘act in good faith’*.⁹⁷
- v. **Prohibit knowingly providing false information on which the other party will rely.** *“Duty of good faith”*.⁹⁸
- vi. **Enforce an obligation to negotiate in good faith.** The Court of Appeal (‘CA’) upheld the term: *“Brasoil agrees to negotiate in good faith with Petromec ...”*.⁹⁹
- vii. **Prohibit negotiating behind the other party’s back.** *“Duty of good faith”*.¹⁰⁰

Express duties of good faith are unlikely to:

- i. **Cut across express contractual rights.** An obligation under a relational contract to *‘work together and individually in the spirit of trust, fairness and mutual co-operation’*, did not create a duty of good faith. Even if present, it would not prevent a party from exercising an express right.¹⁰¹
- ii. **Require a party to give up its commercial interests.** A good faith obligation did not require either party to give up a freely negotiated financial advantage that was clearly embedded within the contract.¹⁰²
- iii. **Convert an agreement to agree into a binding obligation.** However, courts are likely to give effect to an obligation to negotiate where it arises as part of an ongoing agreement,¹⁰³ or the duty to negotiate is intended to assist in resolving a dispute with clarity about how the negotiation will operate. *‘Neither party could thwart [an] obligation [to make reasonable endeavours to agree on pain/gain provisions] by refusing to negotiate in good faith or refusing to allow an Adjudicator or TCC judge to resolve the issue’*.¹⁰⁴

Whilst a good faith obligation may add a specific duty, e.g. an obligation to negotiate in good faith, it is doubtful that it adds to the obligations of a certifier or to co-operation between the parties beyond the general law.

94 *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330.

95 *Horn v Commercial Acceptances* [2011] EWHC 1757.

96 *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319.

97 *Health & Case Management Ltd v The Physiotherapy Network Ltd* [2018] EWHC 869.

98 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111.

99 *Petromec Inc v Petroleo Brasileiro SA* [2005] EWCA Civ 891, distinguishing the decision in *Walford v Miles* [1992] 2 AC 128. But see also *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 (Comm) at [23]-[29] in which the HC refused to imply a term to negotiate in good faith.

100 *Al Nehayan v Kent* [2018] EWHC 333.

101 *TSG Building Services Plc v South East Anglia Housing Ltd* [2013] EWHC 1151.

102 *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632.

103 *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694; *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104.

104 *Alstom Signalling Ltd (t/a Alstom Transport Information Solutions) v Jarvis Facilities Ltd (No 1)* [2004] EWHC 1232 (TCC).

Standard Form Construction Contract Requirements of Good Faith

Notwithstanding the court's views on the meaning of good faith in commercial contracts under English law, an express obligation for parties to act in good faith is increasingly making an appearance in standard forms of construction contracts.

Contract	Provision	Note
JCT Standard Building Contract With Quantities 2016	<i>'Parties shall work with each other and with other project team members in a co-operative and collaborative manner, in good faith and in a spirit of trust and respect. To that end, each shall support collaborative behaviour and address behaviour which is not collaborative'.¹⁰⁵</i> [... perhaps somewhat ironically, given the more onerous risk transfers involved, JCT DB contract also uses terms " <i>co-operative and collaborative manner, in good faith and in a spirit of trust and respect</i> "]	The wording appears to be more expansive than that of the other standard forms noted. It is difficult to see if or how the obligation to 'other project members' creates rights for those other project members pursuant to the Contracts (Rights of Third Parties) Act 1999. What does 'support' add if the individual obligations exist, what more is required here? It is not clear what obligations or actions arise from the stated requirement to 'address behaviour which is not collaborative'. Who decides what is 'not collaborative' and how any behaviour is to be addressed? That is not helped by the lack of clarity or definition around what is collaborative behaviour in the first instance.
JCT Constructing Excellence Contract 2016	Parties agree to <i>'work together with each other and with all other Project Participants in a co-operative and collaborative manner in good faith and in the spirit of trust and respect' under an 'Overriding Principle'.¹⁰⁶</i>	The Overriding Principle reference may have the effect of enhancing the obligation and raising it above a parties own legitimate commercial or self-interest.
NEC4	<i>'The Parties, the Project Manager and the Supervisor shall act in a spirit of mutual trust and co-operation'.¹⁰⁷</i>	Clause 10.2 seeks to establish an obligation on the project manager and the supervisor notwithstanding they are not a party to that contract.
Infrastructure Conditions of Contract (ICC) 2014	<i>'The Contractor, the Employer and the Engineer on his behalf shall each, in the performance of the Contract, collaborate in a spirit of trust and mutual support in the interests of the timely, economic and successful completion of the Works'.¹⁰⁸</i>	Again, the Engineer is not a party to the contract, what obligation is being expressed; what is 'economic and successful completion of the works'?
PPC2000	<i>'The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Project, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents'.¹⁰⁹</i>	Where the obligation is <i>'...within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents'</i> , does the prefix become [mere fluff] superfluous? Is this sufficient to create a duty of good faith that is something more than the <i>'scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents'</i> as touched on under the 'Have parties agreed to act in good faith' section above.

All of the above terms are couched in terms of the 'spirit' of something, or could otherwise be characterised as aspirational. Yet for reason of enforceability, terms need to be certain. What is the spirit of something? If that is defined as 'a particular way of thinking, feeling, or behaving, especially a way that is typical of a particular group of people',¹¹⁰ does that add certainty?

¹⁰⁵ JCT SBC/ Q (2016) clause 1, Schedule 8 (Supplemental Provisions).

¹⁰⁶ JCT CE (2016) clause 2.1. Although JCT CE was one of the forms recommended by the UK Government for early contractor involvement and collaborative working none of the Trial Project teams adopted it, and there is no other evidence available of how the JCT CE wording has been applied in practice.

¹⁰⁷ NEC4 (2017) clause 10.2.

¹⁰⁸ ICC (2014) clause 6.1.

¹⁰⁹ PPC2000 (2013) clause 1.3.

¹¹⁰ Cambridge Dictionary, CUP.

It appears that standard forms want to incorporate the 'spirit' [literally] of good faith as an expression of collaborative working between the parties but appear to have bolted that language on rather than crafting integrated terms that facilitate those behaviours directly.

The above commitments are intended to encourage 'good faith'. They are however non defined terms and expressed using imprecise language. The legal effect of those terms and the obligations attaching to them must be debatable (and potentially, contentious).

The following two cases, involving the NEC contract, illustrate how the English courts continue to interpret good faith wording in different ways:

- i. In *Costain*¹¹¹ it was decided that, while one party should not exploit another party or take advantage of a false assumption on the part of the other, '*the spirit of mutual trust and cooperation*' does not require a party to act against its own self-interest.
- ii. In *NIHE*¹¹² a party was obliged to reveal cost and time data that was against its interests because to not do so would be '*entirely antipathetic to a spirit of mutual trust and cooperation*'.



Express Good Faith obligations in standard form construction contracts - what do they mean?

111 *Costain v Tarmac Holdings* [2017] EWHC 319 (TCC).

112 *Northern Ireland Housing Executive v Healthy Buildings (Ireland)* [2017] NIQB 43.

Good Faith is not a General Organising Principle under English Law

Good faith is not a 'general organising principle'. Such an approach would risk undermining the express contract terms.¹¹³

That reflects the tests for implying terms into a contract governed by English law.¹¹⁴ An implied duty based on good faith is only likely to arise where the contract would lack commercial or practical coherence without it.¹¹⁵

A good faith obligation will not generally be implied under English law. The courts' position is that there is generally no reason to imply such an imprecise provision of little value.

Parties need to know what the contract requires and what the contract permits. In doing so, they look to the black-letter provisions of the contract.

Black-letter-law has developed to incorporate obligations of good faith through the implementation of EU legislation. The hostility of English law towards good faith may be developing into acceptance, in certain circumstances, of a behavioural standard based in honesty and cooperation. If that is not currently the case, how long can English commercial contract law set its face against the concept of good faith when it is now established within its own consumer contract law?

Implied obligations of good faith under English law generally do not assist parties where there is no clear fiduciary relationship and would not in any event modify the express provisions of a contract.



A good faith obligation will not generally be implied under English law. The courts position is that there is generally no reason to imply such an imprecise provision of little value.

113 *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789.

114 Set out by the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72.

115 *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472.

Collaborative Construction Contracts Generally

Collaborative recommendations for incorporation into contracts¹¹⁶ include:

- i. *A specific duty for all parties to deal fairly with each other, and with their subcontractors, specialists and suppliers, in an atmosphere of mutual cooperation' plus 'shared financial motivation' and "incentives for exceptional performance".*¹¹⁷
- ii. *"Clearly defined work stages, including milestones or other forms of activity schedule" and "integration of the work of designers and specialists".*¹¹⁸
- iii. *"Client and contractor to enter into a specific and formal partnering agreement" ... "not limited to a particular project" with "mutually agreed and measurable targets for productivity improvements".*¹¹⁹
- iv. *"Taking all possible steps to avoid conflict on site".*¹²⁰

There are a number of aspects that go to create successful collaboration on projects including:

- i. **The Contract:** *'An effective contract can play a central role in partnering. It sets out the common and agreed rules; it helps define the goals and how to achieve them; it states the agreed mechanism for managing the risks and the rewards; it lays down the*

*guidelines for resolving disputes".*¹²¹

That contract needs to contain appropriately defined express obligations as opposed to general statements of aspirational good faith.

- ii. **Relationship:** Whilst non-binding protocols may *"be taken into account when interpreting the terms of an underlying contract",*¹²² concern, rightly, exists in respect of *"those who simplistically believe that collaboration based on trust alone, without an effective hierarchy of control in the relationship, can achieve improvements in construction outcomes".*¹²³
- iii. **Early and intensified planning:** The Government Construction Strategy 2011 emphasised the importance of consolidated early planning: *"clients issue a brief that concentrates on required performance and outcome; designers and constructors work together to develop an integrated solution that best meets the required outcome; contractors engage key members of their supply chain in the design process where their contribution creates value."* Some contracts¹²⁴ recognise that *"Partnering works by making careful plans at the start of projects and then relentlessly putting them into effect".*¹²⁵

116 'Constructing The Team', Sir Michael Latham, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry, Final Report, July 1994, ISBN 0 11 752994 X.

117 Para. 5.18.1.

118 Para. 5.17.4b.

119 Para. 6.43.

120 Para. 5.18.2 and 5.18.12.

121 The Construction Industry Council "Guide to Project Team Partnering", ISBN 1898671214.

122 HH Humphrey Lloyd in *Birse Construction v St David* (2000) 1 BLR 57.

123 Strategic Procurement in Construction: Towards better practice in the management of construction supply chains, Andrew Cox and Mike Townsend, 1998, ISBN 0 7277 2600 5.

124 E.g. NEC4, PPC2000 etc.

125 Partnering in the Construction Industry: A Code of Practice for Strategic Collaborative Working, John Bennett, Sarah Peace, ISBN-10: 9780750664981.

- iv. **BIM:** Building Information Modelling ('BIM') is frequently regarded as one of the most powerful tools supporting Integrated Project Delivery ('IPD'). BIM combines design, fabrication, erection information and project management logistics in one database and provides a common platform for collaboration across design and construction.¹²⁶
- v. **Dispute Resolution:** Parties may agree to waive claims against each other except for wilful default under a 'no blame' clause often, but not necessarily, supported by integrated project insurance. Where that is not the case, dispute resolution procedures are often tiered from direct negotiation, to mediation, to binding resolution. Emphasis is on a system that encourages and facilitates 'internal' resolution of disputes allowing the integrated and collaborative process to continue. Where parties resort to external dispute resolution, they step away from integration towards an adversarial relationship.

The NBS18 survey¹²⁷ reports 65% of respondents used a contract that 'included an ethos of mutual trust and cooperation'; of which 30% had a 'formal partnering agreement', 16% had a 'non-binding partnering charter', 7% an 'alliancing agreement' and 6% some 'other' collaboration technique.

Many 'partnering' contracts/arrangements use aspirational language about how parties will work together. The courts face the difficulty of interpreting and applying those provisions should dispute arise.

In *Gold Group*,¹²⁸ the High Court rejected the submission that a good faith clause obliged either party to accept less favourable financial terms observing: "... *good faith, whilst requiring the parties to act in a way that will allow both parties to enjoy the anticipated benefits of the contract, does not require either party to give up a freely negotiated financial advantage clearly embedded in the contract.*"

In *TSG*¹²⁹ Akenhead J rejected the contention that there was an implied overriding duty, created by the good faith wording in a TPC2005 contract¹³⁰ to preserve a long-term relationship; the partnering terms did not constrain the right of either party to terminate.

In *Fujitsu Services Ltd ('FSL')*,¹³¹ parties agreed to "*comply with partnering principles*" and "*Good Industry practice*". Edwards-Stuart J rejected the contention that IBM owed FSL fiduciary duties and that there was any implied obligation of good faith in the contract.

BIM and GCS2016-20¹³² refocuses on collaboration. Digitisation provides collaborative tools working across disciplines and locations. BIM is supported by structured information¹³³ and standards¹³⁴ providing a common framework for collaborative working.

As noted by the Construction Industry Council ('CIC') "*An effective contract can play a central role in partnering. It sets out the common and agreed rules; it helps define the goals and how to achieve them; it states the agreed mechanism for managing the risks and the rewards; it lays down the guidelines for resolving disputes*".¹³⁵

126 The American Institute of Architects, *Integrated Project Delivery: A Guide*, 2007.

127 National Construction Contracts and Law Report 2018.

128 *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632.

129 *TSG Building Services v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC).

130 ACA Standard Form of Contract for Term Partnering (TPC 2005 amended 2008).

131 *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC).

132 Government's Construction Strategy 2016-2020, which builds on the 2011 Government Construction Strategy.

133 E.g. the NBS National BIM Library.

134 Such as Publicly Available Specifications (PAS) from BSI: PAS 1192 series [PAS 1192-2:2013; PAS 1192-3:2014; PAS 1192-5:2015; PAS 1192-6:2018] and BS EN ISO 19650-1:2018; BS EN ISO 19650-2:2018; PD 19650-0:2019.

135 CIC A Guide to Project Team Partnering, 2002, ISBN 9781898671213.

Whilst some suggest that “*Negotiating the terms of a formal contract tends to destroy partnering attitudes*”,¹³⁶ to be successful, collaboration must be clearly described in the contract: responsibility for what, when, and with whom. Without that, it is suggested that, collaboration can turn to calamity and quickly become adversarial. Given the difficulties of implying good faith obligations and the definition of what such an obligation actually means in the fact-specific context of a construction project, collaborative practices should be contractually specified and enforced.

The UK Office of Government Commerce (‘OGC’) report¹³⁷ concluded that NEC3, PPC2000 and JCT CE facilitated its Achieving Excellence in Construction (‘AE’) initiative standards which were intended to improve performance of government departments, executive agencies and non-departmental public bodies using e.g.: Partnering; Development of long-term relationships; Slimming down decision-making; Use of performance indicators; Use of integrated procurement routes. AE guidance was archived in 2010 and is no longer updated.

136 Partnering in the Construction Industry: A Code of Practice for Strategic Collaborative Working, 2006, J Bennett, S Peace.

137 Office of Government Commerce, Partnering Contract Review, Report of 25 September 2008, Arup Project Management.

The Impact of Good Faith Obligations on Collaborative Working – Conclusions

I have noted that implied obligations of good faith under English law do not assist parties where there is no clear fiduciary relationship and would not in any event modify the express provisions of the contract, mirrored in the quotation ‘... *I have long believed that the mere inclusion of platitudes that “the parties will work together in good faith” adds little to the implied term of co-operation, and a series of recent cases have shown that such wording seldom avails the parties when a dispute erupts...*’¹³⁸ [emphasis added]

Whilst express terms as to ‘good faith’ will be interpreted and applied by the courts, that application will be dependent upon the clarity of expression attaching to the same in the factual context of the contract.

An obligation of good faith, by itself, does not greatly assist the parties to work together collaboratively.

Mere expression of collaborative intent is no guarantee of collaborative behaviour: it requires knowledge, structure and commitment. That is achieved by providing clarity to the parties’ roles and responsibilities to each other and the project, wrapped into an agreed mechanism for managing and rewarding that involvement whilst actively identifying and resolving issues arising. That combination of approaches allows project participants to work together collaboratively.

138 Sir Rupert Jackson PC, Review of ‘Collaborative Construction Procurement and Improved Value’, 1st Edition, David Mosey, ISBN 9781119151913.

Table of Cases

Al Nehayan v Kent [2018] EWHC 333
Alan Bates and Others v Post Office Limited [2019] EWHC 606 (QB)
Albany Home Loans Ltd v Massey [1997] 2 All ER 609, 612-613
Alstom Signalling Ltd (t/a Alstom Transport Information Solutions) v Jarvis Facilities Ltd (No 1) [2004] EWHC 1232 (TCC)
Amey Birmingham v Birmingham City Council [2018] EWCA Civ 264
Associated British Ports v Tata Steel UK Ltd [2017] EWHC 694
Astor Management AG v Atalaya Mining Plc [2017] EWHC 425 (Comm)
Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd [1990] 1 QB 665, 772
Bedfordshire CC v Fitzpatrick Contractors Ltd [1998] 62 ConLR 64
Beresford v Royal Insurance Co Ltd [1938] AC 586
Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch)
Bernhard Schulte GmbH & Co K.G. v Nile Holdings Ltd [2004] EWHC 977 (Comm), [2004] 2 Lloyd's Rep. 352
Birse Construction Ltd v St David Ltd [1999] BLR 194 (TCC)
Blisset v Daniel (1853) 10 Hare 493
Bristol Groundschool Ltd v Intelligent Data Capture Ltd [2014] EWHC 2145 (Ch)
Carewatch Care Services Ltd v Focus Caring Services Ltd [2014] EWHC 2313 (Ch)
Carter v Boehm (1766) 97 Eng. Rep. 1162, 1165
Conlon v Simms [2006] EWCA Civ 1749, [2007] 3 All ER 802 at [127]
Costain Ltd v Tarmac Holdings Ltd [2017] EWHC 319
CPC Group Ltd v Qatari Diar Real Estate Investment Company [2010] EWHC 1535
D&G Cars Ltd v Essex Police Authority [2015] EWHC 226 (QB)
Director General of Fair Trading v First National Bank [2001] UKHL 52, [2002] 1 AC 507
Downsview Ltd v First City Corp Ltd [1993] AC 295, 312
Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2002] 2 All ER (Comm) 849
Eastwood v Magnox Electric Plc [2004] UKHL 35, [2005] 1 AC 503
Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104
Euro-Diam Ltd v Bathurst [1990] QB 1 at [40], CA
First Energy (UK Ltd) v Hungarian Investment Bank Ltd [1993] 2 Lloyd's Rep 194
Floydd v Cheney, Cheney & Floydd [1970] Ch. 602, 608
Francois Abballe (t/a GFA) v Alstom UK Ltd LTL 7.8.00 (TCC)
Fujitsu Services Ltd v IBM United Kingdom Ltd [2014] EWHC 752 (TCC)
Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd [2016] EWCA Civ 396
Gold Group Properties Ltd v BDW Trading Ltd [2010] EWHC 1632 (TCC)
Hanrlyn v Wood (1891) 2 QB 488, CA
Health & Case Management Ltd v The Physiotherapy Network Ltd [2018] EWHC 869
Henderson v Merrell Syndicates Ltd [1995] 2 AC 145
HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6
Holland Hannen & Cubitts v WHTSO (1982) 18 BLR 80
Horkulak v Camor Fitzgerald International [2004] EWCA Civ 1287, [2005] ICR 402
Horn v Commercial Acceptances [2011] EWHC 1757

Table of Cases

Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41
ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, [2011] All ER (D) 39 (Apr) at (92)
James Spencer & Co. Ltd. v Tame Valey Padding Co. Ltd., QBENI 97/1118 CMS1 (AC April 8, 1998)
Jani-King (GB) Lid v Pula Enterprises Ltd [2007] EWHC 2433 (QB), [2008] 1 All ER (Comm) 451
Johnson v Unisys Ltd [2001] UKHL 13, [2003] 1 AC 518
Jones v St John's College, Oxford (1870) LR 6 QB 115
Knatchbull-Hugessen v SISU Capital Ltd [2014] EWHC 1194 (Comm)
Lambert v Co-operative Ins. Society, [1975] 2 Lloyd's Rep. 485
Lloyds Bank Ltd v Bundy [1975] QB 326
Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd [1989] 1 QB 433
London Borough of Merton v Leach (1985) 32 BLR 51
Lonmar Global Risks Ltd v West [2010] EWHC 2878 (QB), [2011] IRLR 138
Lorne-Stewart v William Sindall (1986) 35 BLR 109
Lynch v Thorne [1956] 1 WLR 303, CA
Mackay v Dick (1881) 6 AC 251 HL
Malik v Bank of Credit and Commerce International SA (In Liquidation) [1998] AC 20
Manifest Shipping Co. Ltd. v Uni-Polaris Shipping Co. Ltd., [2003] 1 AC 469
Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72
Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200
Modahl v British Athletic Federation [2001] EWCA Civ 1447, [2002] 1 WLR 1192
Monde Petroleum SA v Westernzagros Ltd [2016] EWHC 1472
MSC Mediterranean Shipping Company SA v Cottonex Anstalt [2016] EWCA Civ 789
Nathan v Smilovitch (No.2) [2002] EWHC 1629 (Ch)
National Private Air Transport Services Company (National Air Services) Ltd v Creditrade LLP and anor [2016] EWHC 2144 (Comm)
O'Neill v Phillips [1999] 1 WLR 1092, 1098
Paciocco v Australia and New Zealand Banking Group Limited [2015] FCAFC 50
Pan Atl. Ins. Co. Ltd. v Pine Top Ins. Co., [1994] 1 AC 501 (HL)
Petromec Inc v Petroleo Brasileiro SA [2005] EWCA Civ 891
Portsmouth City Council v Ensign Highways Ltd [2015] EWHC 1969 (TCC)
Property Alliance Group Ltd v The Royal Bank of Scotland plc [2016] EWHC 3342 (Ch)
Prudential Staff Pensions Ltd v Prudential Assurance Co Ltd [2011] EWHC 960 (Ch), [2011] PensLR 239
Rosetti Marketing Ltd v Diamond Sofa Co Ltd [2011] EWHC 2482 (QB), [2012] 1 All ER (Comm) 18
Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent [2018] EWHC 333 (Comm)
Societe Les Marechaux Cass. Comm, 10-07-2007
Threlfall v ECD Insight Ltd [2012] EWHC 3543 (QB)
Training in Compliance Ltd v Dewse [2004] EWHC 3094 (QB)
TSG Building Services Plc v South East Anglia Housing Ltd [2013] EWHC 1151 (TCC)
Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514
Walford v Miles [1992] 2 AC 128
Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB)

Table of Publications

A Guide to Project Team Partnering, Construction Industry Council, 2002, ISBN 9781898671213
ACA Standard Form of Contract for Term Partnering (TPC 2005 amended 2008), ISBN: 978-1-901171-34-1
Achieving Excellence in Construction, https://webarchive.nationalarchives.gov.uk/20110802153414/http://www.ogc.gov.uk/Document_Library_procurement_documents.asp
Association of Consulting Architects PPC2000 (Amended 2013), Standard Form of Contract for Project Partnering ISBN: 978-1-901171-43-3
Chitty on Contract, 32nd edn, 2015, Sweet & Maxwell, ISBN: 9780414050679
Constructing The Team, Sir Michael Latham, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry, Final Report, July 1994, ISBN 0 11 752994 X
Good faith in contracts: is there an implied promise to act honestly?, Carter, Courtney, 75 Cambridge Law Journal (2016)
Hudson's Building and Engineering Contracts, 13th edn, 2015, Sweet & Maxwell, ISBN: 9780414034174
Is a Relational Contract a Legal Concept? Professor Hugh Collins in Degeling, Edelman and Goudkamp (eds), Contracts in Commercial Law, Thompson Reuters, 2016
Keating on Construction Contracts, 10th edn, 2016, Sweet & Maxwell, ISBN: 9780414055711
Keating on NEC3, 1st edn, 2012, Sweet & Maxwell, ISBN: 9781847033314
National Construction Contracts and Law Report 2018
NBS National BIM Library, https://www.nationalbimlibrary.com/en-gb/
NEC4: June 2017 Edition, ISBN: 9780727763914
Office of Government Commerce, Partnering Contract Review, Report of 25 September 2008, Arup Project Management
On a clear day you can see the Continent – the shrouded acceptance of good faith as a general rule of contract law on the British Isles, Jan van Dunné, 31 CLJ (2015)
Partnering in the Construction Industry: A Code of Practice for Strategic Collaborative Working, 2006, J Bennett, S Peace, Elsevier, ISBN 13: 978-0-7506-6498-1
Principles of International Commercial Contracts, 1994, International Institute for the Unification of Private Law- Unidroit
Rethinking Construction, HMSO 1998, Sir John Egan
Strategic Procurement in Construction: Towards better practice in the management of construction supply chains, A Cox and M Townsend, 1998, ISBN 0 7277 2600 5
The American Institute of Architects, Integrated Project Delivery: A Guide, 2007
The binding force of agreements to negotiate in good faith, Trakman & Sharma, 73 Cambridge Law Journal (2014)
The Construction Industry Council "Guide to Project Team Partnering", ISBN 1898671214
The Principles Of European Contract Law 2002
Contract Law: Fulfilling the reasonable expectations of honest men, Lord Steyn, 113 The LQRev 1997
The Principles Of European Contract Law 2002 (Parts I, II, and III), European Union

Table of Statutes, Regulations and Standards

BS EN ISO 19650-1:2018
BS EN ISO 19650-2:2018
Commercial Agents (Council Directive) Regulations 1993
Consumer Insurance (Disclosure and Representations) Act 2012;
Consumer Protection (Amendment) Regulations 2014
Consumer Protection from Unfair Trading Regulations 2008
Consumer Rights Act 2015
Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents
Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC
Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance)
Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions Text with EEA relevance
Dutch Civil Code Article's 6:2 and 6:248.
Financial Services (Distance Marketing) Regulations 2004
French Civil Code article 1134, s.3;
German Civil Code [German Bürgerliches Gesetzbuch] § 242;
Greek Civil Code Article 288;
Insurance Act 2015
Italian Civil Code Article's 1175 and 1375;
Late Payment of Commercial Debts (Interest) Act 1998
Late Payment of Commercial Debts Regulations 2013
Marine Insurance Act, 1906, 6 Edw. 7, c. 41, §§17-20 (Eng.)
Portuguese Civil Code Article 762, s.2;
Swiss Civil Code Article 2;
The Commercial Agents (Council Directive) Regulations 1993
Unfair Terms in Consumer Contracts Regulations (SI 1999/2083)

The Author



DEREK NELSON PARTNER, HKA

Derek is a Chartered Quantity Surveyor and Chartered Engineering Surveyor, with over 35 years of construction and engineering experience. He has acted as expert on over 50 occasions in delay, disruption and quantum matters.

Derek is both an accredited and certified expert witness and fellow of The Academy of Experts and has acted as a delay and quantum expert witness in arbitration, conciliation, litigation and mediation and as an expert determiner. He has been cross-examined on a number of occasions and has delivered concurrent evidence in disputes from Belize to Brunei and Scotland to Singapore. Alongside his work as an expert adviser for ongoing projects, Derek undertakes the role of 'project neutral', independently reviewing international projects in preventative, on-the-job dispute resolution.

He has a strong reputation with peers and clients alike and is described as: Derek Nelson *"performs well in cross-examinations"* and offers *"professional and consistently high-quality work"* whilst referred to as *"usually the quickest to comprehend the crux of a matter and from there he offers and communicates the practical options or solutions"*. Derek is *"a gifted quantum expert"* that is commended for his *"vigilance"* during construction disputes. Derek's technical background coupled with his *"intimate knowledge of international construction law and arbitration hearings"* ensure that he is *"highly sought after"* to testify in disputes.



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